OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	)	OTA Case No. 18011084
	)	
KHANITHA ANDERSON	)	Date Issued: August 13, 2018
	)	
	)	
	)	

OPINION

Representing the Parties:

For Appellant: Khanitha Anderson, Taxpayer

For Respondent: Alisa L. Pinarbasi, Tax Counsel

N. ROBINSON, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19047,[1] Khanitha Anderson (appellant) appeals an action by the Franchise Tax Board (respondent) on appellant's protest against a proposed assessment of $245 in additional tax, a delinquent return penalty of $135 and interest all for the 2013 tax year. Appellant waived her right to an oral hearing on November 8, 2017, and therefore this matter is being decided based on the written record.

ISSUES

1. Has appellant demonstrated any error in the proposed assessment for the 2013 tax year?
2. Has appellant established reasonable cause to support abatement of the delinquent filing penalty?
3. Is there sufficient cause to impose a frivolous appeal penalty pursuant to section 19714?

FACTUAL FINDINGS

1. Using its Non-Filer Compliance Program, respondent obtained wage and salary income information that employers report to the Employment Development Department (EDD) and payment information reported on federal Forms 1099 by payors. Respondent obtained information that appellant received income sufficient to require the filing of a

[1] Unless otherwise indicated, all statutory references are to sections of the Revenue and Taxation Code.

California return for 2013.[2] Specifically, respondent received information that Thai Corner Inc. paid appellant $23,760 during 2013.

2. On February 25, 2015, respondent sent a Request for Tax Return for 2013 (Request) to appellant requiring a response by April 1, 2015.

3. On April 1, 2015, appellant responded to the Request by filing with respondent a mostly blank Form 4600G. (The form used by Appellant to reply to a Request.) Section C of the form stated in hand writing "See Attached."[3]

4. On August 3, 2015, respondent issued a Determination of Filing Requirement requiring appellant to file a personal income tax return and pay her tax liability by September 3, 2015.

5. On August 31, 2015, appellant submitted a California Form 3525 (Substitute for Form W-2, Wage and Tax Statement) prepared by appellant asserting that appellant had no income from employment with Thai Corner Inc. for 2013. On the form, appellant listed zero compensation, but $10.34 of state income tax withheld and $237.62 of state disability insurance withheld. Appellant also submitted a Form 540 (California Resident Income Tax Return) for 2013 showing zero income in 2013, but claiming income tax withheld of $247. In addition, appellant submitted a "corrected" Form 1099-MISC prepared by appellant asserting that appellant had no income from TBH Intl. in 2013.[4] Appellant also filed a statement under penalty of perjury stating that the "corrected" Form 1099-MISC was submitted to rebut the documentation indicating her receipt of income and alleging that she did not receive "gains, profits, or income" from TBH Intl. while in the course of a "trade or business" in 2013.

6. On September 10, 2015, respondent sent appellant a Notice of Frivolous Return Determination that declared the return submitted by appellant on August 31, 2015, to be frivolous and requiring appellant to file a valid return within the following 30 days. This

[2] In 2013, a single individual with no dependents realizing gross income of $15,702 or adjusted gross income of $12,562 was required to file a California income tax return. Respondent's estimate of appellant's 2013 income is $23,760.

[3] It is unclear what documents, if any, were attached to the April 1, 2015 Form 4600G.

[4] The Wage and Income Transcript provided by respondent indicates that, in addition to the $23,760 appellant received from Thai Corner Inc., appellant received $1,384 in non-employee compensation reported on a Form1099-MISC with TBH Intl. listed as the payor. This non-employee compensation was not included in respondent's estimate of appellant's income.

notification also informed appellant that failure to file a valid return for 2013 may result in a frivolous return penalty pursuant to section 19179.

7. Appellant responded to the Notice of Frivolous Return Determination with correspondence dated September 29, 2015 disputing respondent's determination. Appellant did not file a valid return for 2013.

8. On November 16, 2015, respondent issued a Notice of Proposed Assessment for 2013 estimating appellant's 2013 income to be $23,760 based on wages, tips, or other compensation (Form W-2 Wage and Tax Statement), reported by Thai Corner Inc. resulting in a tax liability of $245, a $135 delinquent filing penalty and interest.[5]

9. On January 6, 2016, appellant wrote to respondent stating that she filed a return on August 31, 2015, for 2013. A copy of the August 31, 2015 Form 540 was again provided to respondent.

10. On February 22, 2016, respondent sent to appellant a letter confirming that the Form 540 she submitted on August 31, 2015, was frivolous and informed appellant that if a valid return was not filed on or before March 25, 2016, the NPA would become final. This correspondence also notified appellant that her August 31, 2015 Form 540 was determined to be frivolous and therefore respondent was imposing a $5,000 frivolous return penalty pursuant to section 19179.

11. On March 16, 2016, appellant replied to respondent's February 22, 2016 correspondence reiterating the arguments set forth in appellant's September 29, 2015 correspondence.

12. Respondent sent appellant a Protest Clarification Letter on April 21, 2016, asking appellant to notify respondent by May 23, 2016, if appellant's March 16, 2016 correspondence was intended as a protest of the NPA.

13. On May 17, 2016, appellant replied to the Protest Clarification Letter but did not state whether her March 16, 2016 letter was intended as a protest of the NPA.

14. Respondent interpreted the March 16, 2016 correspondence from appellant as a protest of the NPA and sent a notice of hearing pursuant to section 19044 informing appellant of a hearing to occur on April 26, 2017. The notice states that the purpose of the hearing is to give appellant an opportunity to demonstrate that the NPA for 2013 is incorrect. The

[5] As noted previously, respondent's proposed assessment did not include $1,384 in non-employee compensation reported on a Form1099-MISC and listing TBH Intl. as the payor.

notice states that if appellant does not appear at the hearing the NPA dated November 16, 2015, will be affirmed.

15. Appellant did not appear at the hearing scheduled for April 26, 2017.

16. On May 24, 2017, respondent issued a Notice of Action (NOA) affirming the NPA and warning appellant that a penalty of up to $5,000 may be imposed for filing a frivolous appeal. Another warning was included in correspondence from the California Department of Tax and Fee Administration (CDTFA) that penalties may result from pursuing a frivolous appeal.

17. Appellant filed a timely appeal of the NOA.

DISCUSSION

Issue 1- Has appellant demonstrated any error in the proposed assessment for appellant's 2013 tax year?

It is well-settled that once respondent shows that its assessment was reasonable and rational, its determination is presumed to be correct, and a taxpayer has the burden of proving error. (*Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001;[6] *Todd v. McColgan* (1949) 89 Cal.App.2d 509.) California Code of Regulations, title 18, section 30705, subdivision (c) states that unless there is an exception provided by law, "the burden of proof requires proof by a preponderance of the evidence."[7] Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.) A taxpayer's failure to produce evidence that is within her control gives rise to a presumption that such evidence, if provided, would be unfavorable to the taxpayer's case. (*Appeal of Don A. Cookston*, 83-SBE-048, Jan. 3, 1983.)

Section 19087 empowers respondent to "make an estimate of net income, from any available information" when a taxpayer either fails to file a return or files a false or fraudulent return with intent to evade tax. Through its Non-Filer Compliance program, respondent obtained information from the California Employment Development Department (EDD) and payment

[6] Board of Equalization's formal opinions are generally available for viewing on the Board's website at http://www.boe.ca.gov/legal/legalopcont.htm.

[7] A preponderance of evidence means that the taxpayer must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.)

information from federal Forms 1099 for 2013. Respondent determined that appellant had $23,760 of income which is sufficient to require appellant to file a state income tax return. Thus, respondent has provided information demonstrating a rational and reasonable basis for its estimate of appellant's income in 2013. The burden is squarely on appellant to prove that respondent's estimate of income and the resulting calculation of tax is incorrect.

Respondent afforded ample opportunity for appellant to demonstrate that respondent's estimate of appellant's 2013 income was incorrect. Appellant appears to claim that she had no income for 2013 that is subject to state tax, however, despite her lengthy correspondence with respondent she has yet to offer any evidence or explanation as to why the wage income reported by Thai Corner Inc. in the amount of $23,760 is incorrect. There further is no proof that respondent's determination and calculation of tax on that income is erroneous. In the absence of such evidence or explanation, appellant's appeal of the NOA cannot succeed.

Appellant argues at length that respondent's finding of a frivolous return and the associated frivolous return penalty is unsupported. A frivolous return penalty is different from a frivolous appeal penalty. (See Issue 3 below for our analysis of a frivolous appeal penalty.) Arguing that her return reporting zero income is valid, appellant contests respondent's definition of the word "frivolous." The applicable law precludes this forum from evaluating appellant's complaint. Section 19179(e)(1) empowers the Chief Counsel of the Franchise Tax Board as the sole authority to "rescind all or any portion of any penalty" imposed for the filing of a frivolous return. Section 19197(e)(3) states, "any determination under this subdivision may not be reviewed in any administrative or judicial proceeding." Thus, once respondent imposes a frivolous filing penalty and it is not eliminated or changed after review by the respondent's chief counsel, the penalty is final and there is no further appeal right. The Office of Tax Appeals does not have jurisdiction to review a frivolous filing penalty.[8]

Issue 2 - Has appellant established reasonable cause to support abatement of the delinquent filing penalty?

California imposes a penalty for the failure to file a valid return on or before the due date, unless it is shown that the failure was due to reasonable cause and not due to willful neglect. (§ 19131.) The penalty is computed at five (5) percent of the tax due, after allowing for timely

[8] Also, the frivolous appeal penalty is separate from the NOA assessment and thus was not at issue in this appeal.

payments, for every month that the return is late, up to a maximum of 25 percent. (§ 19131(a).)

The burden is on the taxpayer to establish reasonable cause for the failure to timely file. (*Appeal of M.B. and G.M. Scott*, 82-SBE-249, Oct. 14, 1982.) To establish reasonable cause, the taxpayer "must show that the failure to file timely returns occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinary intelligent and prudent businessman to have so acted under similar circumstances." (*Appeal of Stephen C. Bieneman*, 82-SBE-148, July 26, 1982; *Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.) Each taxpayer has a personal, non-delegable obligation to file a tax return by the due date. (*United States v. Boyle* (1985) 469 U.S. 241.) Ignorance of the law is not an excuse for failing to file a timely return. (*Appeal of J. Morris and Leila G. Forbes*, 67-SBE-042, Aug. 7, 1967.)

Appellant's apparent and unsubstantiated allegation that she did not have income in 2013 is clearly contrary to the evidence. As noted above, respondent received information from the EDD that appellant received compensation of $23,760 from Thai Corner Inc. Appellant has failed to produce any evidence of good cause for her filing a return by the April 15, 2014 deadline.

Issue 3 - Is there sufficient cause to impose a frivolous appeal penalty pursuant to section 19714?

In accordance with Section 19714, the Office of Tax Appeals may impose a penalty of up to $5,000[9] whenever it appears that a proceeding before it has been instituted or maintained primarily for delay or that the taxpayer's position in the proceeding is frivolous or groundless.[10] Under the applicable regulation, the following non-exclusive list of factors are considered in determining whether to impose the penalty, and in what amount: (1) whether the taxpayer is making arguments that have been previously rejected by the Office of Tax Appeals in a precedential opinion, by the Board in a Formal Opinion, or by the courts; (2) whether the taxpayer is repeating arguments that he advanced unsuccessfully in prior appeals; (3) whether the taxpayer filed the appeal with the intent of delaying legitimate tax proceedings or the legitimate

[9] The penalty for filing a frivolous appeal pursuant to section 19714 is different from the $5,000 penalty imposed by respondent for filing a frivolous return pursuant to section 19179. OTA has jurisdiction to review a section 19714 penalty but not a section 19179 penalty.

[10] Section 19714 refers to proceedings before the "State Board of Equalization," however, Section 20(b) explains that this phrase now refers to the Office of Tax Appeals because the State Board of Equalization's authority to handle tax appeals has been transferred to this agency.

collection of tax owed; and (4) whether the taxpayer has a history of filing frivolous appeals or failing to comply with California's tax laws. (Cal. Code Regs., tit. 18, § 30502(b)(1-4).)[11]

Appellant appeals the NOA on the basis that she has filed, under penalty of perjury, a valid return for 2013 that reported zero income. Without explanation, appellant is apparently claiming that she did not receive income in 2013 and thus had no legal requirement to file a return and pay tax. The contention that wages are not income has been repeatedly rejected by our predecessor agency and the courts. (See, *Appeal of Robert E. Wesley, et al.*, 2005-SBE-002, Nov. 15, 2005; *Appeal of La Vonne A. Hodgson*, 2002-SBE-001, Feb. 6, 2002; *Appeal of Michael E. Myers*, *supra*; *Appeal of Alfons Castillo*, 92-SBE-020, July 30, 1992; *Appeal of Walter R. Bailey*, 92-SBE-001, Feb. 20, 1992; *Appeals of Fred R. Dauberger, et al.*, 82-SBE-082, Mar. 31, 1982). In addition, it is well established that "zero returns" are frivolous. (See, e.g., *Whitaker v. Commissioner*, T.C. Memo. 2017-92 [citing additional cases].) Thus, appellant's attempt to eliminate her income by filing a return and preparing revised IRS forms showing, contrary to fact, that she received no income.

There is no evidence in this record that appellant has a history of contending on appeal that wages, tips or other compensation is not income and thus cannot be taxed. Additionally, respondent has issued the maximum $5,000 penalty for filing a frivolous return. In its May 24, 2017 NOA, respondent warned appellant that a penalty of up to $5,000 may be imposed for prosecuting a frivolous appeal. Appellant was additionally warned by the CDTFA in correspondence dated July 18, 2017, that she appeared to be making frivolous arguments and that a frivolous appeal penalty of up to $5,000 could be imposed. However, appellant nonetheless continued prosecuting a baseless appeal with frivolous arguments. We find that imposition of the frivolous appeal penalty in the amount of $500 for this first-time offense is warranted under the circumstances in this case.[12]

HOLDINGS

1. Appellant has failed to demonstrate any error in the proposed assessment.

[11] The Office of Tax Appeals' regulation concerning imposition of the frivolous appeal penalty is virtually identical to its predecessor Board's regulation on this subject. (See Cal. Code Regs., tit. 18, § 5454.)

[12] The imposition of a $500 frivolous appeal penalty for 2013 may be a factor that is considered in determining whether to award a frivolous appeal penalty in future appeals. Appellant is advised that, if she files additional appeals making frivolous argument, a penalty of up to $5,000 per appeal may be imposed.

2. Appellant is liable for the late-filing penalty as determined by respondent.

3. Appellant has filed a frivolous appeal.

DISPOSITION

Respondent's action is sustained in full and a frivolous appeal penalty of $500 is imposed.

DocuSigned by:
Neil Robinson
8A2E234444DB4A6...
Neil Robinson
Administrative Law Judge

We concur:

DocuSigned by:
Grant S. Thompson
FC572D5881AE41B...
Grant Thompson
Administrative Law Judge

DocuSigned by:
Jeff Angeja
0D390BC3CCB14A9...
Jeff Angeja
Administrative Law Judge